87-1843

No. _____

In The

Supreme Court Of The United States

OCTOBER TERM, 1987

JOHN F. KOLENBERG
Petitioner

v.

THE BOARD OF EDUCATION OF THE CITY OF STAMFORD, CONNECTICUT
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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QUESTION PRESENTED

Petitioner, a tenured public school teacher in Connecticut, brought this action to state court complaining, *inter alia*, that his employer, a local school board, had denied him certain individual rights afforded him by the federal constitution, when it failed to renew his teaching contract. The Petitioner prevailed at trial. On appeal, the Supreme Court of the State of Connecticut on its own motion dismissed the case for lack of subject matter jurisdiction on the grounds that Petitioner's complaint, including his federal claims, was subject to the grievance-arbitration procedure of the collective bargaining agreement between Petitioner and Respondent and that the existence of an arbitration provision precluded the Petitioner from asserting such claims in court.

The question thus presented is: May a state court preclude an employee from utilizing the state judicial system to assert claimed violations of federal constitutional rights by his employer on the grounds that there exists a collective bargaining agreement submitting workplace disputes to arbitration.

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1985. Neither the Report nor Memorandum is officially reported. Both appear in the Appendix at 1A. The trial court, thereafter, rejected the referee's report and without further proceedings entered judgment for the Respondent. The trial court's decision is not officially reported but is reprinted in the Appendix at 11A. On January 26, 1988, the Supreme Court of the State of Connecticut ordered Petitioner's case dismissed for lack of subject matter jurisdiction. The opinion is reported at 206 Conn. 113, 536 A.2d 583, and appears in the Appendix at 13A.

JURISDICTION

The Connecticut Court's decision issued on January 26, 1988. Petitioner filed a motion for reconsideration and reargument which was denied on February 19, 1988. In compliance with the January 26, 1988 decision the trial court dismissed the matter on February 22, 1988. This Petition is filed within ninety days of the Connecticut Court's denial of Petitioner's motion for reconsideration and reargument.

Title 28 U.S.C. § 1257 confers jurisdiction on this Court to review the judgment of the state court by writ of certiorari.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III, Section 2, Clause 1 of the United States Constitution states in relevant part:

> The Judicial Power shall extend to all cases, in law and equity, arising under the Constitution, the Laws of the United States, and Treaties made . . . under their authority;- . . .

Article VI, Clause 2 of the United States Constitution states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Fourteenth Amendment, Section 1, to the United States Constitution states in part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Connecticut General Statutes § 10-151 states in relevant part:

> (d) The contract of employment of a teacher who has attained tenure shall be continued from school year to school year, except that it may be terminated [for cause, after a hearing]. . . .

STATEMENT OF THE CASE

In 1977, John F. Kolenberg was a tenured school teacher employed by the Board of Education of the City of Stamford, Connecticut. In that year Kolenberg requested a leave of absence for the academic year 1977–1978. The Board granted the leave.

The collective bargaining agreement then operative between the Respondent and the teachers' bargaining agent contained a provision requiring all teachers on leave to notify the Board of their intention to return by February 1st of the year of the leave. The contract further required Respondent to provide copies of the collective bargaining agreement to each teacher. No agreement, however, was delivered to or received by Petitioner.

Not knowing of the February 1st deadline, Kolenberg missed it. He did notify the Respondent of his intention to return, but the notice was a month-and-one-half late. Claiming late notice, the Respondent refused to reinstate Kolenberg to his teaching position.

Connecticut has a "teacher tenure act," Connecticut General Statutes § 10-151. The statute guarantees the right to continued employment to all public school teachers. It states that a tenured teacher's contract "shall be renewed" from year to year unless the teacher is terminated for cause, as defined in the statute. Further, a teacher, after notice that his contract is under consideration for termination, is entitled

under the statute to a due process hearing pursuant to which his employer must establish cause. Appendix at 36A.

The Respondent ignored Connecticut General Statutes § 10-151. It did not terminate the Petitioner for cause as defined in the statute. It did not afford the Petitioner the opportunity to attend a hearing. Relying on the temporal deadline contained in the collective bargaining agreement, the Respondent insisted that the Petitioner had forfeited his job and as a result was simply no longer a teacher.

Petitioner brought his action in state court challenging his non-renewal. The action asserted that the forfeiture which the Respondent sought to impose could not prevail for two core reasons: (1) The Board's action violated the due process clauses of the Constitution of the United States, the Constitution of the State of Connecticut and the due process provisions of Connecticut General Statutes § 10-151; (2) The forfeiture was invalid as a matter of state contract law because (a) the notice provision could not constitute a waiver of the Petitioner's constitutional and statutory rights especially, as here, when the Petitioner did not even know about the contractual deadline; (b) time was not of the essence in the contract; (c) the Respondent did not rely upon the February 1st deadline but indeed did not begin its hiring process until well after it received the Petitioner's notice of intention to return; (d) other teachers had provided late notice and were not forced to forfeit their jobs.

The trial court appointed an attorney state trial referee to hear Petitioner's case. The referee, for the reasons propounded by the Petitioner, found that the Petitioner had never been terminated as a teacher and that as a result he should be continued in his position and awarded back pay. Appendix at 1A.

In reviewing the trial referee's findings, the state trial court rejected the report. The Connecticut Rules of Practice, § 443, require that upon such rejection the case be retried or

submitted for further proceedings. In this case, however, the trial entered judgment against the Petitioner without affording the Petitioner with an opportunity to present further evidence or, indeed, without allowing for further proceedings of any sort. Appendix at 11A.

Kolenberg filed his appeal from the trial court's action to the Appellate Court for the State of Connecticut. Prior to presenting oral argument before the Appellate Court, the Connecticut Supreme Court on its own motion removed the appeal to its own docket.

After oral argument the Connecticut Supreme Court, *sua sponte* and *sua motu*, dismissed Petitioner's action for lack of subject matter jurisdiction. The Court held that because there existed a collective bargaining agreement between the Respondent and Petitioner's collective bargaining agent the Petitioner was required to submit this entire dispute — including Petitioner's claims that his federal constitutional rights have been violated — to the grievance-arbitration procedure contained in the agreement. Appendix at 23A.

The dismissal of the Petitioner's case by the state court raises the following federal question: Does the existence of an arbitration clause, contained within a collective bargaining agreement, preclude an employee from seeking vindication of federally granted individual rights in state court.

The question presented did not appear in Petitioner's case until it was raised by the Connecticut Court, itself, after appeal at oral argument. Appendix at 22A. Petitioner informed the Connecticut Court of his belief that its holding violated federal law on the first opportunity, in his Motion For Reconsideration and Reargument. Appendix at 32A-35A.

REASONS FOR GRANTING THE WRIT

In *Kolenberg, supra,* and in its ideological predecessor, *School Administrator's Assn. v. Dow,* 200 Conn. 376, 511 A.2d 1012 (1986), the Connecticut Court has decided a federal question in a way which conflicts with the requirements of the United States Constitution and authoritative decisions of this Court. Both cases stand for the proposition that an employee, subject to a grievance-arbitration provision in a collective bargaining agreement, may never bring his claims of violation of federally granted rights to court, but must instead submit his entire dispute to arbitration.

The federal law is to the contrary. On four recent occasions this Court has held that individual rights granted employees by statute or constitution are to be heard in court, regardless of the existence of an arbitral remedy.

First, in *Alexander v. Gardner-Denver Co.,* 415 U.S. 36 (1974) the Court ruled that the submission of a workplace dispute to arbitration did not preclude an employee from bringing his Title VII claim to federal court. The Court noted:

> In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective-bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums. *Alexander, supra,* pp. 49, 50.

This Court repeated the distinction between individual rights — those which may be litigated in court — and collective rights — those which are subject to arbitration — in

Barrentine v. Arkansas-Best Freight System, 450 U.S. 728 (1981). There, the Court held that an employee could bring an action in federal district court, alleging a violation of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* after previously having unsuccessfully submitted a grievance on the same underlying facts. The Court, following *Gardner-Denver, supra*, stated:

> Not all disputes between an employee and his employer are suited for binding resolution in accordance with the procedures established by collective bargaining. While courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective-bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers. *Barrentine, supra*, p. 737.

The rationale for allowing individual rights to be pursued in court is pointed out in *Barrentine:* (1) Where the legislature has created a right, it is for the legislature to determine the forum in which the right can be vindicated. *Barrentine*, p. 745; (2) Collective rights and individual rights are not always compatible and it is the collective bargaining agent, not the individual, who controls the grievance procedure. *Barrentine*, p. 742; (3) Because of the simplified nature of the arbitration proceeding and because arbitrators are more attuned to the law of the shop than they are to the law of the land, arbitration is not suited to resolve complex legal questions of public policy or statutory or constitutional interpretation. *Barrentine*, p. 744; (4) Judicial review of an arbitration proceeding is so narrowly circumscribed as to foreclose an employee from having a claimed violation of individual rights considered on its merits. *Barrentine*, p. 744; (5) Even where a violation of individual rights is found, an arbitrator may lack the power to fashion an effective remedy. *Barrentine*, p. 745.

In *McDonald v. City of West Branch*, 446 U.S. 284 (1984) this Court applied the individual-collective rights distinction to actions arising under 42 U.S.C. § 1983. The Court refused to give preclusive effect to an unappealed arbitration decision, holding that 42 U.S.C. § 1983 created a cause of action which Congress intended to be judicially enforceable. The Court stated:

> It is apparent, therefore, that in a § 1983 action, an arbitration proceeding cannot provide an adequate substitute for a judicial trial. Consequently, according a preclusive effect to arbitration awards in § 1983 actions would severely undermine the protection of federal rights that the statute is designed to provide. We therefore hold that in a § 1983 action, a federal court should not afford res judicata or collateral estoppel effect to an award in an arbitration proceeding brought pursuant to the terms of a collective bargaining agreement. *McDonald, supra*, pp. 290-291.

Most recently in *Atchison, Topeka & Santa Fe Railway Company v. Buell*, ____ U.S. ____ (1987); 107 S. Ct. 1410 this Court applied the rationale of the prior three cases to hold that the existence of a grievance mechanism submitting workshop disputes to arbitration did not preclude the assertion of an individual worker's claim in court under the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.*

The Connecticut Court, apparently oblivious to this Court's precedents, has charted a wholly different course. The first marker of the Connecticut Court's misdirection was *Dow, supra.* There nineteen public school administrators sought to enjoin the school board's termination of their jobs and positions, claiming, *inter alia*, that the actions of the defendants violated federal constitutional rights. Because of the existence of a collective bargaining agreement, containing an arbitration clause, the Connecticut Court dismissed the case for lack of subject matter jurisdiction:

> In this case the individual plaintiffs and their union brought suit seeking to enjoin the board from eliminating certain administrative positions and from dismissing ten individuals. The complaint alleged that the defendants acted unfairly, violated the parties' collective bargaining agreement, violated state statutory procedures, and violated the plaintiffs' constitutional rights to due process and equal protection. Despite the multiple allegations made, the complaint is not unlike those usually brought for employee grievances and essentially seeks relief for harms occurring in the context of an employer-employee relationship. See *Cahill v. Board of Education*, 198 Conn. 229, 236-39, 502 A.2d 410 (1985). Given the broad wording of the grievance provisions of the collective bargaining agreement, we have no doubt that the relief requested in this case is within the scope of the contractual remedies available. See *Legg, Mason & Company, Inc. v. MacKall & Coe, Inc.*, 351 F. Sup. 1367, 1370-71 (D.C. Cir. 1972) ("complaint sounding in tort will not in itself prevent arbitration if the underlying contract embraces the disputed matter"); *Merrick v. Writers Guild of America, West, Inc.*, 130 Cal. App. 3d 212,219; 181 Cal. Rptr. 530 (1982). The plaintiffs therefore should have pursued their claims under the grievance-arbitration provisions of their collective bargaining agreement before seeking redress in state court. The trial court was thus in error when it refused to dismiss the complaint for lack of jurisdiction. *Dow, supra*, pp. 384, 385.

The misdirection of *Dow* continues further in *Kolenberg*. At p. 121 of *Kolenberg*, the Connecticut Court, incorrectly, states that petitioner's federal claims were raised for the first time on appeal.[1] But the holding is not based on this claimed

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[1] That this was an erroneous statement was pointed out to the Connecticut Court in Petitioner's motion for reconsideration or reargument, wherein Petitioner highlighted for the state court that his federal claims were raised in his complaint and as "Claims of Law" at all possible and applicable stages of the litigation below. App. at 29A and 30A.

omission. The Connecticut Court held, "Furthermore, had they (the federal claims) been raised below, the trial court would have lacked subject matter jurisdiction to entertain them because they would more appropriately have been advanced in the context of a grievance proceeding." *Kolenberg*, pp. 121, 122.

State courts have concurrent jurisdiction to hear and decide § 1983 claims. *Allen v. McCurry*, 449 U.S. 90 (1980). "State Courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law." *Stone v. Powell*, 428 U.S. 465, 495 n. 35 (1976). "Upon the state courts, equally with the courts of the Union rests the obligation to guard and enforce every right secured by that Constitution." *Smith v. O'Grady*, 312 U.S. 329, 331 (1946), citing *Mooney v. Holohan*, 294 U.S. 103 (1941). "The States cannot, in the exercise of control over local laws and practice vest state courts with power to violate the supreme law of the land." *Hines v. Lowry*, 305 U.S. 85, 90, 91 (1938); *Kalb v. Feinstein*, 308 U.S. 433, 439 (1940).

One of the reasons the United States Supreme Court has appellate jurisdiction over state courts is:

> the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution. Judges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States or even the constitution, itself. If there were no reviewing authority to control these jarring and discordant judgments and harmonize them into uniformity the law, the treaties, and the constitution of the United States would be different in different states and might perhaps, never have precisely the same construction obligation or efficiency in any two states. *Martin v. Hunter's Lessee*, 1 Wheat. 304, 341–344 (1816).

Connecticut has tens of thousands of state and municipal employees subject to collective bargaining agreements. The ruling of the Connecticut Supreme Court in *Kolenberg* denies these tens of thousands of workers any meaningful avenue to litigate constitutional claims arising out of employment in state court. In Connecticut, as a result of *Dow* and *Kolenberg*, governmental employees claiming a denial of constitutional or federal rights are virtually required to assert such denials in federal court. If the ruling in *Kolenberg* is adopted in other jurisdictions, the numbers of employees without an effective state court remedy would increase proportionately. This potentially staggering influx of new federal court litigates is totally unwarranted where, as here, the result announced by the state court is a facial violation of Article VI, Clause 2 of the United States Constitution.

"Ultimately, recourse may be had to this Court by certiorari if a state court has allegedly denied a federal right." *Public Service Commissioner of Utah v. Wycoff Co.*, 344 U.S. 237, 248 (1952). In this instance the Connecticut Supreme Court has denied Petitioner the right to have his federal constitutional guarantees protected in state court. It has done so under the erroneous belief that where an arbitration clause exists, the state court is foreclosed from protecting constitutionally-granted individual rights.

CONCLUSION

For the foregoing reasons the Petitioner respectfully requests that this Court grant a writ of certiorari to review the issues presented by this Petition.

Respectfully submitted,

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REPORT

1. Trial of this matter occurred on October 30 and 31, 1985;

2. Pursuant to stipulation of counsel, the time to render a decision was enlarged to a date within thirty (30) days of receipt of the transcript;

3. The transcript was received by the Attorney/Referee on November 6, 1985;

4. The plaintiff John Kolenberg was hired by the Stamford Board of Education ("Board") in April, 1974.

5. Before being hired by the Board, and before earning his Bachelor's degree, Mr. Kolenberg had been employed at a private school, the Brunswick School, in Greenwich, Connecticut.

6. Upon his employment, by the Board, Mr. Kolenberg was assigned to teach mathematics at Turn of River Middle School.

7. Mr. Kolenberg taught seventh and eighth grade mathematics at Turn of River Middle School from April, 1974 through June, 1977.

8. At all times relevant to this dispute Mr. Kolenberg was a tenured teacher and possessed a Standard Certificate from the State of Connecticut Board of Education licencing him to teach all elementary subjects (grades 1 through 8) and social studies (grades 7 through 12).

9. By a letter dated June 23, 1977, Mr. Kolenberg formally requested a leave of absence for the 1977-78 school year.

10. The purpose for such leave was to run a city-wide religious program for public school students at St. Cecilia's Church.

11. Prior to the request for leave, Mr. Kolenberg had been working in his spare time at St. Cecilia's Church helping to run a religious education program.

12. By letter dated June 27, 1977, the Assistant Superintendent for personnel, responded to Mr. Kolenberg's request for a leave by advising him;

> "In response to your letter requesting a leave of absence for the 1977-1978 school year and in accordance with contract provisions in article 13 of the current teachers' contract, I am recommending this one year leave of absence without pay to the Stamford Board of Education. I have every reason to believe that your request will be granted; therefore, you may proceed to finalize your special plans for the 1977-1978 school year. Your leave will commence July 1, 1977 and run through June 30, 1978.
>
> Best wishes for a successful and worthwhile year."

13. By a letter dated July 21, 1977, the then Superintendent of Schools notified Mr. Kolenberg that the Board had approved his leave of absence "in accordance with the policies and regulations of the Board of Education and the teacher's contract regarding such leave."

14. Mr. Kolenberg did not know of any statement set forth in any contract, regulation or other document concerning leaves of absence.

15. Article 13 of the collective bargaining agreement provides that:

> 1) A unit member shall be eligible for a voluntary leave of absence for a period of one school year without pay or benefits if he or she notifies the Personnel Office in writing by July 1st preceding the school year desired for leave of the intention to take leave.

2) Upon conclusion of said leave, the unit member shall be entitled to reemployment in the position he or she left if available or in a comparable position for which he or she is certified.

3) However, to be entitled as in 2 above, said unit member shall notify the Personnel Office in writing by February 1st of the year prior to expected return of intention to return. If notification is not received by said date, said unit member loses entitlement to re-employment.

16. Board policy number 4152, concerning leaves of absence provides that;

"Such leave should normally coincide with an official school year . . . the teacher must make application, in writing, to return to duty for an extension at least sixty days prior to the termination of said leave . . . the teacher will be guaranteed to return to duty only by the first day of the school year following termination of leave.

17. Mr. Kolenberg had not been provided a copy of the Collective Bargaining Agreement prior to April 26, 1978.

18. During his leave of absence, Mr. Kolenberg received no telephone call, letter or other contract from the Board of Education concerning his leave or his intention to return.

19. On April 26, 1978, Mr. Kolenberg went to the personnel office and informed the Assistant Superintendent that he intended to return to his teaching duties and, on that date delivered a hand-written notice to the Board to that effect.

20. The Assistant Superintendent, at that time, told Mr. Kolenberg both orally and in writing that he had missed the contract deadline and that, as a result, he had forfeited his right for reinstatement.

21. The statement of forfeiture by the Assistant Superintendent was never ratified or acted upon by the Board.

22. The Assistant Superintendent told Mr. Kolenberg that, should he reapply for a position as a Stamford Public School teacher he would be given due consideration with other applicants seeking employment.

23. From April, 1978 through the date of the trial, Mr. Kolenberg was ready, willing and able to resume his employment with the Stamford school system.

24. From April, 1978 through the date of the trial, the Stamford school system refused to allow Mr. Kolenberg to continue his employment and has not employed him for any purpose, including that of substitute teacher.

25. Mr, Kolenberg never requested a hearing before the Board or that the Board provide him a statement of reason for his unemployment status.

26. The Board did not commence interviewing candidates for the teacher's position until May of 1978, candidates were not screened until June and were not hired until August or September.

27. As of September, 1978 a job for which Mr. Kolenberg was both qualified and certified existed with the Board.

28. In at least two instances, the Board and/or its agents had waived temporal requirements of a teacher missing the deadline for notification.

29. Had Mr. Kolenberg continued teaching with the Board he would have been paid the following amount:

A.	For the 1978 school year	$ 12,220.00;
B.	For the 1979 school year	13,910.00;
C.	For the 1980 school year	15,480.00;
D.	For the 1981 school year	17,982.00;
E.	For the 1982 school year	21,038.00;
		and
F.	For the 1983 school year	23,581.00
		$104,211.00

30. For a coterminus period of time with that set forth in paragraph 29, Mr. Kolenberg earned monies by continuing his pre-leave employment with the Diocese of Bridgeport. This work could have been coterminus with his thwarted Board of Education employment.

31. During the 1979-1984 school years, the plaintiff was employed at the Greenwich Youth Shelter ("GYS") for an aggregate compensation of $44,700.00.[1] His hours of employment at the GYS were approximately 11 P.M. until 8 A.M. The compensation received from the GYS is an off-set to Plaintiff's damages since it is found that he could not have continued his GYS employment while working for the Board of Education.

32. For the 1984-1985 school year, Mr. Kolenburg would have received the sum of $26,589.00 as salary.

33. As more expansively set forth in the contemporaneously filed Memorandum, the plaintiff never resigned his employment, was never validly terminated from his employment and was always available for employment and thus until either resignation or termination continues as an employee of the defendant.

34. The plaintiff's allowed quanitifiable (sic) damages are $86,100 plus interest through November 11, 1985 in the

[1] The fact that the plaintiff voluntarily resigned his GYS employment in January, 1984, has not been factored in as a reduction to the off-set, since the plaintiff had a duty to mitigate damages.

amount of $30,536.80, the calculation of which is set forth in the contemporaneously filed memorandum. Said quanitification does not include any damages suffered by the plaintiff for continued loss of employment for the 85/86 school year.

35. The parties are ordered to submit, for signature by the attorney/referee, within two weeks a proposed supplemental report specifying post-trial damages (i.e. wage entitlement to date for the post trial ensuing school year less any off-sets); but, in the event that they are unable to agree, then a further hearing shall be held limited to that issue.

36. Subject to revision by the supplemental report for the accruing damages for the post trial school year, judgment should enter in favor of the plaintiff for $86,100 plus interest through November 11, 1985 in the amount of $30,799.88 plus statutory interest post November 11, 1985 plus costs of suit.

Respectfully Submitted

Matthew J. Forstadt, Esq.,
Attorney/Referee

Dated November 12, 1985

MEMORANDUM

It would serve no useful purpose to fully set forth each of the findings which the Attorney/Referee has made. Suffice it to say, for the purpose of this Memorandum, that the "core" issue in this case is whether or not the plaintiff resigned from employment, as a teacher, with the Stamford Board of Education. If he voluntarily resigned, he is entitled to no redress through this lawsuit. If, however, he did not voluntarily resign, then there remains the question as to what his status is.

One of the central issues of the case is the effect of C.G.S. Sec. 10-151. While it is true that the plaintiff is a tenured

teacher, it would not be appropriate to blithely assume that C.G.S. Sec. 10-151 circumscribes, in all circumstances, the events under which a tenured teacher can lose that status. It would seem clear from the statutory scheme that C.G.S. Sec. 10-151 would not preclude a teacher, whether tenured or otherwise, from voluntarily retiring from employment. Obviously, a tenured teacher who chooses to retire need not, even if he/she could, invoke the provisions of Sec. 10-151 in order to be relieved of responsibilities as a teacher. Conversely, there would seem to be no reason to require a Board of Education, in the face of a voluntary resignation, to invoke the procedures set forth in C.G.S. Sec. 10-151 to effect a termination of employment of a teacher who voluntarily chose to retire. Thus, by a process of narrowing and defining the issues, it must be resolved whether or not, within the matrix of the facts presented, the plaintiff voluntarily resigned from his employment. If he did voluntarily resign, he is entitled to no redress. If, on the other hand, he did not voluntarily resign or otherwise waive or relinquish his right to employment, the Board, having not invoked any procedures pursuant to C.G.S. Sec. 10-151, maintains a continuing liability to the plaintiff at least until such time as some action is undertaken to terminate his employment.

It would seem, beyond cavil that a leave of absence is not, *a fortiori*, resignation. Such principle of law is enunciated in the case of *Bauer v. Castello*, 7 Conn. Sup. 98. Furthermore, the evidence in the case *sub judice* is clear that even the Board of Education considered Mr. Kolenberg during the period of his leave of absence to be employed at least until the expiration of the leave of absence which was June 30, 1978. The Board's position is that, notwithstanding that he was an employee, even during his leave of absence until June 30, 1978, he resigned his employment by not providing the purported requisite notification by February 1, 1978. If the defendant's theory is examined from the standpoint of a resignation, it proves to be defective. The Attorney/Referee cannot accept and rejects any thesis that an employee can unknowingly, unintentionally and contrary to his own wishes resign. To hold

otherwise would be to engage in a rather euphemistic interpretation of the commonly accepted meaning of the term "resignation." Support for this thesis can be found in *Lindbergh School District v. Syrewicz,* 516 S.W. 2d 507 (Missouri, 1974) wherein the Court held that

> "We believe that upon failure to comply with the requirements of the sabbatical leave program, the district cannot unilaterally determine that such failure constitutes the resignation and abandonment of his permanent teacher's contract without complying with the provisions of the Teacher Tenure Act of Missouri. *Id.* 512.

Nor can it be gainfully argued by the defendant that the plaintiff has waived his rights to resume his employment.

It is axiomatic that "waiver is the intentional relinquishment of a known right." *Johnson v. Zerbert,* 304 U.S. 458 (1938); See *McClain v. Murran,* 183 Conn. 418. There was no evidence to deduce that the plaintiff voluntarily and/or knowingly relinquished a known right. It is clear that the plaintiff, being tenured, had a right to continue employment had he provided notification of his intentions so to do prior to February 1, 1978. However, there was no proof deduced that the plaintiff knew of an obligation to provide notification prior to February 1, 1978 and/or that the plaintiff knew that, with the absence of such notification, he would loose (sic) his entitlement to reemployment.

The ramifications of this conclusion would not be altered, even if we were to assume, *arguendo,* that the plaintiff was deemed to know or that knowledge of the contract which he had not received was imputed to him. Even had the plaintiff known of the loss of re-entitlement to employment in the absence of notification prior to February 1, 1978, it would seem the better course to hold that any such waiver of the entitlement to reemployment was subsequently rescinded by the notice given by him in April of 1978. There was no evidence

aduced (sic) that the Board, in any way, changed its position as a result of the claimed waiver of the entitlement to re-employment arising from the non-notification on February 1. Indeed, the testimony was to the contrary. The testimony was that the Board did not even begin interviewing candidates until subsequent to the April notification by Mr. Kolenberg of his intention to resume employment. Thus, even if there were a waiver as of February 1, 1978, that waiver was rescinded by the notification of April 26, 1978 and, in the absence of any change in position, detriment or prejudice to the defendant, there would seem to be no reason not to allow a revocation of any such waiver. A contrary holding would clearly effect a forfeiture of Mr. Kolenberg's entitlement to reemployment. See *Fountain Co. v. Stein*, 97 Conn. 619; *Galvin v. Simmons*, 128 Conn. 616.

Contrary to the suggestion of the defendant, this case does not present a *per se* personnel issue. The issue is not whether or not Mr. Kolenberg was a good teacher, a bad teacher or anything in between. Nor is the issue whether or not the Board has the perogative to hire those teachers who it feels best qualified for the position. The sole issue is whether or not Mr. Kolenberg ceased to be an employee and, if he did not, the remedy to be imposed by the Court. For the foregoing reasons, it is concluded that Mr. Kolenberg did not cease to be an employee of the Board of Education. This is not to say that the Board could not, now or in the future, invoke proceedings pursuant to C.G.S. Sec. 10-151 to terminate Mr. Kolenberg; but, no such proceedings have ever been instituted.

Pursuant to the rationale discussed above, it is not even necessary to consider the efficacy of the remedy of reinstatement. The plaintiff, never having been terminated and having been determined not to have waived, relinquished, or retired, a simple adjudication that he is still an employee of the Board of Education would and does suffice. However, having determined that he is still a member of the Board of Education, the issue as to monetary recompense must be resolved. The compensation which the plaintiff was, pursuant to the

rationale hereinabove set forth entitled to through the 1985 school year is $130,800 less the sum of $44,700.00 which is found to be wages earned or capable of being earned by the plaintiff which would not have been earned had he continued his teaching responsibilities with the Board of Education. The plaintiff claims interest on the sums found to be due and owing and, in fairness in view of the time-money differential, the plaintiff should be entitled to interest. While it is theoretically mathematically possible to determine a per diem interest rate on the amount owed by calculating the elapsed time from each payment period at the statutory rate prevailing for each such pay period, it is not within the context of the case necessary to do so. As a discretionary element of the award of interest it is deemed to be more appropriate to award interest at the present statutory rate of 10%, *Neiditz v. Morton Fine and Associates*, 2 Conn. App. 322, 332, in accordance with the following schedule:

Mid Point School Year		Cumulative Interest as of 10/30/85	Per Diem
01/30/79	12,220.00	8,248.50	3.3944
01/30/80	13,910.00	7,998.25	3.8638
01/30/81	7,480.00	3,553.00	2.0777
01/30/82	9,782.00	3,668.25	2.7172
01/30/83	12,538.00	3,447.95	3.4827
01/30/84	13,581.00	2,376.68	3.7725
01/30/85	16,589.00	1,244.17	4.6080
	$86,100.00	$30,536.80	23.9166

Amount owed as of:

November 11, 1985:

Proven Damages:	130,800.00
Allowed Off-set:	(44,700.00)
Cumulative Interest:	30,536.08
Per Diem Interest:	263.08
	$116,899.88

Judgment should enter in favor of the plaintiff for the amount of $116,899.88 plus per diem interest from November 11, 1985, plus costs of suit, exclusive of damages to be determined for continued loss of employment for the 85/86 school year.

Respectfully submitted,

Matthew J. Forstadt
Attorney/Referee

Dated November 12, 1985

MEMORANDUM OF DECISION

The plaintiff John Kolenberg was a tenured school teacher employed by the Stamford Board of Education. In June 1977, he asked for and received a leave of absence for one year.

The collective bargaining agreement between the board and the teacher's union, of which the plaintiff was a member, provided that any teacher who was on leave of absence must notify the board of his intention to return by February first of the year prior to his return. Mr. Kolenberg did not provide the requisite notice until April 26, 1978, and the board said he was too late and ruled that his actions constituted a resignation.

The plaintiff filed this action contending that General Statutes Sec. 10-151 required the board to hold a formal termination hearing.

> The matter was referenced to an Attorney State Trial Referee who ruled that the board should have afforded the teacher a hearing under that statute and recommended reinstatement and back pay for the plaintiff from September 1978 to such time as he is provided with a Sec. 10-151 hearing.

Pursuant to Practice Book Sec. 443, I am rejecting the report, revoking the reference and entering judgment for the defendant (without costs to either party) because I do not believe that General Statutes Sec. 10-151 applies to a situation in which the teacher constructively resigns.

By failing to comply with the February first deadline, I believe the plaintiff constructively resigned his teaching position and that the statute only applies where the board itself decides to terminate a teacher's employment.

Dated at Stamford, Connecticut this 24th day of June, 1986.

LEWIS, J.

Filed June 24, 1986

JOHN F. KOLENBERG *v.* BOARD OF EDUCATION OF THE CITY OF STAMFORD ET AL. (13137)

PETERS, C. J., HEALEY, SHEA, COVELLO and HULL, Js.

The plaintiff, a tenured teacher, sought, inter alia, damages for the allegedly wrongful termination of his employment by the named defendant board of education, which had failed to reemploy him after a leave of absence. The plaintiff had been denied reemployment because of his failure to inform the board of his intention to return to work by the date established in the collective bargaining agreement between his union and the board. He alleged in the first count of his complaint that the defendants had violated the Teacher Tenure Act (§ 10-151), in the second count that two teachers had been hired in violation of his rights, and in the third count that the defendant assistant superintendent of personnel had broken a promise to give him first preference for an available position. The trial court granted the defendants' motions for summary judgment on the second and third counts, and referred the matter to an attorney state trial referee for a trial on the first count. Thereafter, the trial court rejected the referee's report recommending judgment for the plaintiff, revoked the reference and rendered judgment for the defendants. On the plaintiff's appeal, *held:*

1. The trial court lacked subject matter jurisdiction over the plaintiff's § 10-151 claim and should have dismissed the first count; the plaintiff

was not terminated for cause within the meaning of § 10-151, and, moreover, he had failed to exhaust the grievance and arbitration procedures available to him under the collective bargaining agreement between his union and the board.

2. The plaintiff having failed to join as parties the two teachers whose contracts he was challenging, the trial court should have dismissed the second count for lack of subject matter jurisdiction.

Argued November 6, 1987—decision released January 26, 1988

Action to recover damages for the defendants' wrongful deprivation of the plaintiff's employment as a tenured public school teacher, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and referred to *Matthew J. Forstadt,* attorney state trial referee, who recommended judgment for the plaintiff; thereafter, the court, *Lewis, J.,* rendered judgment for the defendants rejecting the referee's report, from which the plaintiff appealed. *Error in part; judgment directed.*

Marshall Goldberg, for the appellant (plaintiff).

Paul W. Orth, with whom, on the brief, was *Joan C. Harrington,* for the appellees (defendants).

HULL, J. The plaintiff, John F. Kolenberg, appeals from a decision of the trial court rejecting the report of an attorney state trial referee, revoking the reference and entering judgment for the defendants.

The following facts are undisputed. The plaintiff was employed by the defendant, the board of education of the city of Stamford (board), as a mathematics teacher from April, 1974, to June, 1977. He was awarded tenure in March, 1977. In June, 1977, he requested a leave of absence for the 1977–78 school year. This request was granted. At the end of April, 1978, the plaintiff notified the board of his intention to return to work in September, 1978. The assistant superintendent of the board advised the plaintiff that, under the collec-

tive bargaining agreement between the board and the plaintiff's union, notification of his intention to return to work was required by February 1, 1978,[1] and that, as a consequence of the plaintiff's failure to meet that deadline, he had lost his entitlement to reemployment. The plaintiff's teaching position was still vacant at this juncture. Throughout the summer of 1978 and thereafter, the plaintiff sought reinstatement and reemployment for all positions for which he was certified, but was unsuccessful.

In October, 1978, the plaintiff brought this action against the board, the city of Stamford, Robert W. Peebles, superintendent of schools, and James J. Morris, assistant superintendent of personnel. The first count alleged that the defendants had failed to reemploy the plaintiff following his leave of absence, in violation of General Statutes § 10-151. In the second count, the plaintiff alleged that two teachers had been hired in violation of his rights and he sought a declaratory judgment that their employment contracts were illegal and void. He also sought temporary and permanent injunctions against the defendants and the two teachers and a writ of mandamus to compel the defendants to reinstate him in his former teaching job. Thereafter, the

[1] Article 13, § II, of the agreement between the board and the Stamford Federation of Teachers, July, 1977, through July, 1980, provides in pertinent part:

"B. VOLUNTARY LEAVE

"1. A unit member shall be eligible for a voluntary leave of absence for a period of one school year without pay or benefits if he or she notifies the Personnel Office in writing by July 1st preceding the school year desired for leave of the intention to take leave.

"2. Upon conclusion of said leave, the unit member shall be entitled to re-employment in the position he or she left if available or in a comparable position for which he or she is certified.

"3. However, to be entitled as in 2 above, said unit member shall notify the Personnel Office in writing by February 1st of the year prior to expected return of intention to return. If notification is not received by said date, said unit member loses entitlement to re-employment."

plaintiff amended his complaint to add a third count alleging that Morris had promised him first preference for an opening for a mathematics teacher and had broken that promise, and he added to his prayer for relief a claim for back pay and benefits.

Nearly six years after commencement of the suit, the plaintiff requested permission to amend his complaint to add claims of due process violations proscribed by 42 U.S.C. §§ 1983, 1985 and 1986, and the due process and equal protection clauses of the fourteenth amendment to the United States constitution. The defendants objected to the amendment and the court, *Cioffi, J.*, denied the plaintiff leave to amend. Earlier, the court had stricken the case from the jury docket and ordered that it be tried to the court.

In 1984, the defendants moved for summary judgment on all three counts. The court, *Ryan, J.*, granted the motion as to counts two and three, but denied summary judgment as to count one on the ground that a factual question regarding the plaintiff's tenure status was unresolved and that there was a legal question of whether the board's refusal to reemploy the plaintiff constituted a termination within the meaning of General Statutes § 10-151. The matter was referred to an attorney state trial referee for trial. After trial, the referee issued his report containing thirty-four findings of fact and a memorandum concluding that the plaintiff did not resign his position by failing to meet the February 1 deadline nor was he terminated by the board, and that he remained employed by the board. The referee assessed damages against the board in the amount of $116,899.88 for loss of wages and interest.

Following the denial by the referee of the defendants' motions to correct the report, the matter came before the Superior Court for judgment. The court, *Lewis, J.*, rejected the report, revoked the reference and rendered

judgment for the defendants, holding that § 10-151 did not apply to the plaintiff's "constructive resignation" triggered by his failure to meet the February 1 deadline.

The plaintiff appeals raising as claims of error: (1) the manner in which the trial court reviewed, rejected and disposed of the referee's report; (2) the trial court's refusal to permit the plaintiff to amend his complaint; (3) removal of the case from the jury list; and (4) the trial court's granting of summary judgment on count two of the complaint.[2] We hold that the court lacked subject matter jurisdiction over counts one and two and should have dismissed the case. Accordingly, we find error only in the court's disposing of count one by rendering judgment for the defendants and in granting the defendants' motion for summary judgment on count two. In light of our disposition of this case, we need address only the first and fourth claims of error.

I

With respect to count one, the plaintiff contends that the court rejected the referee's report and revoked the reference in a manner inconsistent with Practice Book §§ 440 through 443. He argues that the court erroneously acted on the report by rejecting it when there were motions to correct it still outstanding, and that, following rejection, rather than leaving the case to be disposed of by the court, as directed by Practice Book § 443,[3] the trial court prematurely disposed of the case.

[2] The plaintiff asserts no claim of error with regard to the trial court's granting of summary judgment on count three.

[3] "[Practice Book] Sec. 443. FUNCTION OF THE COURT

"The court shall render such judgment as the law requires upon the facts in the report as it may be corrected. If the court finds that the [referee] has materially erred in his rulings or that by reason of material corrections in his findings the basis of the report is subverted or that there are other sufficient reasons why the report should not be accepted, the court shall

The defendants argue that the plaintiff's action was not cognizable under General Statutes § 10-151 and the court, therefore, lacked subject matter jurisdiction and appropriately rendered judgment for the defendants. We agree with the defendants that the court lacked subject matter jurisdiction.

General Statutes § 10-151,[4] the Teacher Tenure Act, provides for continuing employment of tenured teach-

reject the report and refer the matter to the same or another [referee] for a new trial or revoke the reference and leave the case to be disposed of in court.

"The court may correct a report at any time before judgment upon the written stipulation of the parties or it may upon its own motion add a fact which is admitted or undisputed or strike out a fact improperly found."

[4] General Statutes § 10-151 provides in pertinent part: "(d) The contract of employment of a teacher who has attained tenure shall be continued from school year to school year, except that it may be terminated at any time for one or more of the following reasons: (1) Inefficiency or incompetence; (2) insubordination against reasonable rules of the board of education; (3) moral misconduct; (4) disability, as shown by competent medical evidence; (5) elimination of the position to which the teacher was appointed or loss of a position to another teacher, if no other position exists to which such teacher may be appointed if qualified, provided such teacher, if qualified, shall be appointed to a position held by a teacher who has not attained tenure, and provided further that determination of the individual contract or contracts of employment to be terminated shall be made in accordance with either (A) a provision for a layoff procedure agreed upon by the board of education and the exclusive employees' representative organization or (B) in the absence of such agreement, a written policy of the board of education; or (6) other due and sufficient cause. Nothing in this section or in any other section of the general statutes or of any special act shall preclude a board of education from making an agreement with an exclusive bargaining representative which contains a recall provision. Prior to terminating a contract, a board of education shall vote to give the teacher concerned a written notice that termination of such teacher's contract is under consideration and, upon written request filed by such teacher with such board within seven days after receipt of such notice, shall within the next succeeding seven days give such teacher a statement in writing of the reasons therefor. Within twenty days after receipt of written notice by the board of education that contract termination is under consideration, such teacher may file with such board a written request for a hearing. A board of education may designate a subcommittee of three or more board members to conduct hearings and submit written findings and recommenda-

ers, except that a teacher may be terminated for inefficiency or incompetence, insubordination, moral misconduct, medical disability, elimination of the teaching position or loss of the position to another teacher, or other due and sufficient cause. General Statutes

tions to the board for final disposition in the case of teachers whose contracts are terminated for the reasons stated in subdivision (5) of this subsection. Such hearing shall commence within fifteen days after receipt of such request, unless the parties mutually agree to an extension, (A) before the board of education or a subcommittee of the board, (B) if indicated in such request or if designated by the board before an impartial hearing panel or, (C) if the parties mutually agree, before a single impartial hearing officer chosen by both parties. If the parties are unable to agree upon the choice of a hearing officer within five days after their decision to use a hearing officer, the hearing shall be held before the board or panel, as the case may be. The impartial hearing panel shall consist of three members appointed as follows: The board of education shall appoint one panel member, the teacher shall appoint one panel member, and those two panel members shall choose a third, who shall serve as chairperson. Within ninety days after receipt of the request for a hearing, the impartial hearing panel, subcommittee of the board or hearing officer, unless the parties mutually agree to an extension, shall submit written findings and a recommendation to the board of education as to the disposition of the charges against the teacher, and shall send a copy of such findings and recommendation to the teacher. The board of education shall give the teacher concerned its written decision within fifteen days of receipt of the written recommendation of the impartial hearing panel, subcommittee or hearing officer. Each party shall pay the fee of the panel member selected by it and shall share equally the fee of the third panel member or hearing officer and all other costs incidental to the hearing. If the hearing is before the board of education, the board shall render its decision within fifteen days after the close of such hearing, and shall send a copy of its decision to the teacher. The hearing shall be public if the teacher so requests or the board, panel or subcommittee so designates. The teacher concerned shall have the right to appear with counsel at the hearing, whether public or private. A copy of the transcript of the proceedings of the hearing shall be furnished by the board of education, upon written request by the teacher within fifteen days after the board's decision, provided the teacher shall assume the cost of any such copy. Nothing herein contained shall deprive a board of education of the power to suspend a teacher from duty immediately when serious misconduct is charged without prejudice to the rights of the teacher as otherwise provided in this section. . . .

"(f) Any teacher aggrieved by the decision of a board of education after a hearing as provided in subsection (d) of this section may appeal therefrom, within thirty days of such decision, to the superior court. Such appeal

§ 10-151 (d) (1) through (6). The statute establishes procedures for notice to the teacher and hearing of the matter before an impartial panel; General Statutes § 10-151 (d); and affords the teacher the right to appeal the decision to the Superior Court. General Statutes § 10-151 (f).

Section 10-151 protects a tenured teacher from termination of employment except for cause or elimination of the teaching position. *Cahill* v. *Board of Education*, 198 Conn. 229, 240, 502 A.2d 410 (1985). We recognize that not all separations from employment as a teacher are encompassed by the statute. Since, by its terms, the statute contemplates termination initiated by the board of education, a teacher's retirement or voluntary resignation would not trigger the act's protections. We have also noted that termination of a tenured teacher's employment under § 10-151 "carries with it a suggestion of the teacher's unsuitability." Id., 241. We have acknowledged that termination for cause "may implicate a teacher's professional standing and reputation for competence, efficiency, and integrity . . . ." *Lee* v. *Board of Education*, 181 Conn. 69, 79–80, 434 A.2d 333 (1980).

shall be made returnable to said court in the same manner as is prescribed for civil actions brought to said court. Any such appeal shall be a privileged case to be heard by the court as soon after the return day as is practicable. The board of education shall file with the court a copy of the complete transcript of the proceedings of the hearing held by the board of education or by an impartial hearing panel for such teacher, together with such other documents, or certified copies thereof, as shall constitute the record of the case. The court, upon such appeal, shall review the proceedings of such hearing and shall allow any party to such appeal to introduce evidence in addition to the contents of such transcript, if it appears to the court that additional testimony is necessary for the equitable disposition of the appeal. The court, upon such appeal and after a hearing thereon, may affirm or reverse the decision appealed from. Costs shall not be allowed against the board of education unless it appears to the court that it acted with gross negligence or in bad faith or with malice in making the decision appealed from."

Here, the plaintiff was denied renewal of his teaching position, not for reasons related to his personal competence, but because he had failed to meet the deadline for notifying the board of his intention to return to work in the following school year. Consequently, he was not terminated for cause within the meaning of § 10-151. See *Delagorges* v. *Board of Education*, 176 Conn. 630, 635–36, 410 A.2d 461 (1979). Furthermore, access to the courts under the Teacher Tenure Act is possible only on appeal of a decision of the board of education. General Statutes § 10-151 (f). In this case, there was no appeal, nor could there have been. Therefore, the court lacked jurisdiction over the case, should not have referred it to a referee and should have dismissed the action. See *Simmons* v. *State*, 160 Conn. 492, 280 A.2d 351 (1971) (where statute upon which action is based is inapplicable, trial court is without jurisdiction and reference to referee is improper). Accordingly, it is not necessary for this court to determine whether the trial court properly followed the practice rules invoked by the plaintiff.

The plaintiff also argues, for the first time on appeal, that: (1) his tenure is a protected property right under the federal and state constitutions, violated by the nonrenewal provision of the collective bargaining agreement; (2) he was not aware of the deadline because he had not been given a copy of the collective bargaining agreement, and that the failure of the board to provide him a copy was itself a violation of the agreement; (3) as a matter of contract law, the deadline provision did not make time of the essence of the contract; and (4) the board did not consistently enforce such deadlines. These issues are not properly before this court because they were not raised below, nor did they arise after trial. Practice Book § 4185. Furthermore, had they been raised below, the trial court would have lacked subject matter jurisdiction to entertain them

because they would more appropriately have been advanced in the context of a grievance proceeding.[5] *School Administrators Assn.* v. *Dow,* 200 Conn. 376, 382–83, 511 A.2d 1012 (1986).

The collective bargaining agreement between the plaintiff's union and the board delineates a formal four step procedure for filing a grievance: the matter is presented, in turn, to the teacher's principal or immediate supervisor, to the superintendent of schools, to the board of education, and finally, to arbitration. The agreement defines "grievance" as "a claim by a unit member . . . that there has been a violation, misinterpretation or misapplication of the provisions of this Agreement or of the rules, regulations, administrative directives or policies of the Board."

Enforcement of the arbitration provisions by the court is provided by General Statutes § 52-408. Following arbitration, the parties may apply to the court to have the award confirmed, corrected, vacated or modified. General Statutes §§ 52-417 through 52-420. Under General Statutes § 52-421, judgment may be entered upon the award, rendering it enforceable as if it had been rendered in a civil action. General Statutes § 52-423 affords a right of appeal from judgment on an arbitration award.

[5] The parties did not address the applicability of grievance proceedings to this dispute in their briefs. We have before us, among the exhibits on appeal, the collective bargaining agreement which, in Article 23, provides for resolution of employer-employee disputes through grievance and arbitration proceedings and a formal grievance declaration signed by the plaintiff. Failure to exhaust available grievance and arbitration remedies implicates the court's subject matter jurisdiction. *School Administrators Assn.* v. *Dow,* 200 Conn. 376, 383, 511 A.2d 1012 (1986). The issue of subject matter jurisdiction may be raised at any time, even on appeal; *Concerned Citizens of Sterling* v. *Sterling,* 204 Conn. 551, 556–57, 529 A.2d 666 (1987); and by the court itself. See *Manley* v. *Pfeiffer,* 176 Conn. 540, 545, 409 A.2d 1009 (1979). Once brought to the court's attention, it must be resolved. *Cahill* v. *Board of Education,* 198 Conn. 229, 238, 502 A.2d 410 (1985). Therefore, we decide this issue although it was not raised by the parties.

The Teacher Negotiation Act; General Statutes §§ 10-153a through 10-153n; and the arbitration statutes; General Statutes §§ 52-408 through 52-424; evidence a preference for resolving disputes between teachers and boards of education through contract grievance proceedings, thereby affording both union and employer an exclusive and uniform method for orderly settlement of grievances. See *School Administrators Assn.* v. *Dow*, supra, 381–82. We have held that, "as a matter of state law, parties to a collective bargaining agreement must attempt to exhaust the exclusive grievance and arbitration procedures established in their agreement before resorting to court." Id., 382.

The grievance procedures afforded by the collective bargaining agreement were available to the plaintiff to redress the loss of his teaching position. They were an appropriate vehicle for the resolution of his claims, including his constitutional claims. Id., 382–83. In fact, the record contains evidence that a grievance proceeding had been commenced but not pursued. There was testimony that the plaintiff's formal grievance complaint was presented by the then chairman of the union's grievance committee to Peebles who declined to discuss it on the ground that the matter was in litigation. The union proceeded no further, nor is there any evidence that the plaintiff followed up the matter with the union.

It is clear that the plaintiff failed to exhaust the grievance and arbitration procedures available to him, thereby depriving the trial court of subject matter jurisdiction.[6] The court, therefore, should have dismissed count one.

[6] We have before us the entire collective bargaining agreement. There is no indication that the parties did not intend the grievance-arbitration procedures to be other than the exclusive remedy for resolution of their disputes.

II

We also hold that the court lacked subject matter jurisdiction over count two. In that count, the plaintiff sought a judgment declaring that the defendants had improperly and illegally awarded employment contracts to nontenured teachers while denying him reinstatement, and that those contracts were void. In granting summary judgment, the court found that the plaintiff had failed to comply with § 390 (d) of the Practice Book and that the court thus lacked subject matter jurisdiction. Section 390 (d) provides that the court will not render a declaratory judgment "unless all persons having an interest in the subject matter of the complaint are parties to the action or have reasonable notice thereof." We have required strict adherence to this rule and have held that failure to comply with it is fatal to the court's jurisdiction. *Tucker* v. *Maher*, 192 Conn. 460, 468–69, 472 A.2d 1261 (1984); *Pinnix* v. *LaMorte*, 182 Conn. 342, 343, 438 A.2d 102 (1980). "This rule is not merely a procedural regulation. It is in recognition and implementation of the basic principle that due process of law requires that the rights of no man shall be judically determined without affording him a day in court and an opportunity to be heard." *Benz* v. *Walker*, 154 Conn. 74, 77, 221 A.2d 841 (1966); *Tucker* v. *Maher*, supra, 469.

The plaintiff argues that the issue of noncompliance with § 390 (d) was not before the court because it was not raised by the defendant and not briefed by either party. This contention is without merit. Since failure to comply with § 390 (d) implicates subject matter jurisdiction, it can be raised at any point in the proceedings, even on appeal, and by the court. *Tucker* v. *Maher*, supra; *Manley* v. *Pfeiffer*, 176 Conn. 540, 545, 409 A.2d 1009 (1979).

The trial court, without specifying those persons required to be joined as parties or entitled to reasonable notice of the action, stated that neither count two nor the record as a whole establishes that all persons having an interest in the subject matter of the complaint were joined as parties or notified. The record supports the court's conclusion. Without ascertaining the identification of all persons falling within the ambit of § 390 (d), at the very least, in addition to the named defendants, the two teachers whose contracts were under attack by the plaintiff had an interest in the subject matter of the litigation and were entitled to the safeguards afforded by § 390 (d). The court, therefore, was without jurisdiction over the second count.

There is error, the judgment is set aside and the case is remanded to the trial court with direction to dismiss both counts for lack of subject matter jurisdiction.

In this opinion the other justices concurred.

D.N. 13137

: SUPREME COURT

JOHN F. KOLENBERG

v. : STATE OF CONNECTICUT

BOARD OF EDUCATION OF THE
CITY OF STAMFORD, ET AL : FEBRUARY 4, 1988

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO REARGUE OR RECONSIDER

I. **Introductory Statement:**

An appeal is the offspring of what transpired below as reflected in the record. See *Practice Book* § 4084 *et seq.* and *Practice Book* § 4185. The Court is confined to matters appearing in the record or fairly deducible from it. Maltbie, *Connecticut Appellate Procedure* § 310, citing *Gavin v. Johnson*, 131 Conn. 489, 499; *Pepin v. Ryan*, 133 Conn. 12, 18. The Court requires of litigants the most stringent adherence to the record; consistently holding that unless the matter appears of record it will not be considered on appeal. *Aksomutas v. Aksomutas*, 205 Conn. 93, 97 *Choplin v. Balkes*, 189 Conn. 445, 447; *State v. McCall*, 1987 Conn. 73, *State v. Nardino*, 187 Conn. 513; *New Haven Redevelopment Agency*, 184 Conn. 444, 449; *Knight v. Bourbeau*, 194 Conn. 702, 704. A decision of this Court in which the dispositive provisions rest on misstatements of what is and what is not contained in the record, necessarily therefore, does not rest on the foundation required of decisions on appeal.

II. **Argument: THE DECISION MISSTATES THE RECORD**

The decision in this case mistates the record in three distinct areas each dispositive to the result and in one nondispositive area. The errors are as follows:

1. At pp. 121 and 122 the Court holds that the instant matter is subject to arbitration and thus as a matter of subject matter jurisdiction may not be heard by the Court. The Court reaches this result as if were not addressed below. "[W]e decide this issue although it was not raised by the parties." Footnote 5, p. 122.

This is not a correct statement.

The issue was raised at each appropriate stage of the litigation below. First, the defendants raised arbitrability as a special defense. (See defendants' Third and Fifth Special Defenses Record pp. 30 and 31). The plaintiff briefed the issue in his *Trial Brief and Claims of Law* filed with the Trial Referee. (See plaintiff's *Trial Brief and Claims of Law* dated November 16, 1984 pp. 37-40 annexed hereto as Exhibit A). Even the defendants briefed the issue of arbitrability before the Trial Referee. (See post-trial brief of the defendant dated November 16, 1984 at pp. 13-16).

The plaintiff prevailed on the issue of arbitrability before the Referee. The Referee by deciding the merits of the dispute effectively ruled that the special defenses were inapplicable and that this dispute was not subject to arbitration. This result stems from either or both of the alternative grounds, which the plaintiff presented to the Referee: (1) by express contract language the arbitration clause does not embrace this dispute; (2) by their actions the defendants waived any right they might otherwise have had to arbitrate. (See Exhibit A, pp. 39-41).

That the issue of arbitrability was, in fact, raised below and resolved in the plaintiff's favor gives rise to a whole new series of considerations necessarily ignored by the Court in deciding *Kolenberg* as if there were no previous discussion of the issue. In the normal course a litigant who wishes to preserve an issue raised and lost before a State Trial Referee must (i) present the claim in a Motion to Correct directed to the Referee, *Practice Book* § 438; (ii) identify the issue as an

Exception or Objection to the Report, *Practice Book* § 439 and § 440; and (iii) set forth during the course of any appeal the nature and existence of such claim as an alternative grounds for sustaining the judgment of the lower court. *Practice Book* § 4013. In other words what is missing from the record are any efforts by the defendant to preserve the arbitrability issue. Not the issue itself.

Several undesirable results stem from the Court's erroneously reporting that the arbitration issue was not raised or discussed below:

1. The Court has announced and circulated an inaccurate decision.

2. The appellate process has been shortcircuited resulting in a deprivation of due process to the plaintiff. The plaintiff in this case has had an issue upon which he prevailed below taken away from him without notice or the opportunity to be heard. "[D]ue process of law requires that the rights of no man shall be judicially determined without affording him a day in court and an opportunity to be heard." *Benz v. Walker*, 154 Conn. 74, 77, cited in *Kolenberg*, p. 124. The deprivation imposed on the plaintiff is not excused or otherwise justified by the fact that subject matter jurisdiction can be raised at anytime. Here the issue of arbitrability and subject matter jurisdiction were raised below and the plaintiff prevailed on it. By stating that they were not raised below this Court has taken away on appeal the notice and opportunity to be heard which the plaintiff enjoyed below and it has done so without any notice or opportunity to be heard.

3. The litigants in this case and indeed all those who read and rely upon it in the future are deprived of the studied analysis necessary for the advancement of the doctrine announced in *School Administrators*

Association v. Dow, 200 Conn. 376. By erroneously reporting that the question of arbitrability was not raised below, the Court has deprived future readers of the *Kolenberg* decision of the twin analysis fundamental to the refinement of *Dow* doctrine — i.e., what was the scope of the arbitrability clause and was, or indeed can, contract arbitration be waived. These issues are in this case. By misreporting that they are not, the Court has not fairly or fully advanced the holding of *Dow supra*.

2. At p. 121 the Court declined to review what the plaintiff presented as the core issues in this litigation — 1) the constitutionality of the contract forfeiture clause, 2) the effect of the plaintiff never having received a copy of the contract, 3) the lack of materiality in any breach of the contract, 4) the arbitrary nature of applying the contract deadline — in part, because in the Court's view they were presented for the first time on appeal. "These issues are not properly before this Court because they were not raised below, nor did they arise after trial." p. 121.

This is not a correct statement.

The plaintiff litigated this case below on the very issues which the court reports were not raised below. They are, were and have always been in the case. They were raised at each stage of the litigation. The plaintiff raised them when the defendants sought summary judgment. (See Brief in Opposition to Summary Judgment dated August 10, 1984 pp. 2-14, annexed hereto as Exhibit B). The plaintiff presented them as Claims of Law in his post-trial Brief to the Referee. (See Exhibit A: the constitutional issue is raised at pp. 11-13; the contract issues at pp. 20-27; the materiality of breach issue at pp. 28-33; and the arbitrary application of the contract at p. 7). The issues which the Court says were not raised below were presented to the trial court on yet a third occasion when the plaintiff filed its *Brief In Support of Acceptance of Trial Referee's Report* which Brief is dated June 9, 1986. (See Exhibit C: the constitutional issues are discussed at pp. 5-7;

the contract issue at pp. 14-26 and the arbitrariness issue at p. 2).

The place to raise a Claim of Law which may be the subject of appeal is in a written trial brief. *Practice Book* § 285A. The plaintiff in this case filed three briefs, each containing the Claims of Law that the Court says were not raised below. The defendants filed a like number of briefs attempting to deflect them. To report that issues were not raised below and for that reason not decide them on appeal is inaccurate and unfair.

3. The Court upheld the lower court's granting of summary judgment as to the Second Count of the plaintiff's complaint — the Count which sought a declaratory judgment — because two teachers whose contracts were under attack by the plaintiff were not given the notice required by *Practice Book* § 390(d). (See pp. 124 and 125).

This is a confusion or misstatement of the record.

The complaint as originally drafted and as later amended on December 5, 1978 does state that two nontenured teachers were afforded teaching positions by the defendants in derogation of the plaintiff's tenure rights. Both the complaint and the amended complaint identified the two teachers by name. (See Record pp. 8 and 13). Indeed, both the complaint and the amended complaint sought the removal of the two teachers in question. (See Record pp. 8 and 17).

On July 23, 1980, however, the plaintiff voluntarily revised his complaint. (See Record pp. 19-27). The revised complaint dropped all reference to the two teachers. Their names do not appear. There is no prayer for relief requesting that they or indeed any other teacher be removed from their job.

It was this revised complaint that was before the lower court when it granted summary judgment as to the Second Count. The absence of notice to these two teachers could not

logically have been the reason for the lower court's granting of the motion for summary judgment. They were not in the case. Certainly, there was nothing in the lower court's Ruling on Summary Judgment that even refers to the absence of notice to these two teachers as the basis for the decision. Nor can the failure to notify them be the basis for sustaining the lower court result on appeal. "The voluntary filing of a substitute complaint operate[s] as a withdrawal of the original complaint, so that on appeal the original complaint was not before the court except as a part of the history of the case." *Pope v. Watertown,* 136 Conn. 437, 438; *Antman v. Connecticut Light & Power Company,* 177 Conn. 230, 234.

The gravamen of the plaintiff's appeal concerning the granting of summary judgment against him on the Second Count was that it was done without notice or the opportunity to be heard. The significance of this deprivation is magnified when this Court continues to deny the plaintiff the opportunity for such a hearing and does so based on the existence of a pleading that had dropped out of the case, a pleading that was not before the trial court, and a pleading not before this Court.

4. At p. 117 the Court reports that a basis for the plaintiff's appeal was that the trial court entered judgment against the plaintiff while there was still pending motions to correct the Referee's Report.

This is not a correct statement.

No such claim was ever made. Indeed, to the the best of the plaintiff's knowledge no such motions were or are outstanding.

The plaintiff submits that this is not a dispositive misreading of the record but it is nevertheless provided to the Court in support of the plaintiff's contention that the errors in the *Kolenberg* decision are so pervasive as to merit reconsideration.

III. **Conclusion:**

The existence of misstatements is sufficient unto itself to warrant reargument or reconsideration. But the impact of the decision as written is also broader. The Court, in dismissing the case for lack of subject matter jurisdiction has decided by indirection, almost inadvertance, the core issue of this litigation — what is the scope of C.G.S. § 10-151; does the statute protect tenured teachers against contractual forfeitures of their jobs? The decision suggests that contractual forfeitures are outside of C.G.S. § 10-151 and are thus a permitted means of divesting a tenured teacher from his position at least so long as the contractual forfeiture is facially not cause related. This may be the correct result. The Court might well have reached such a conclusion after an analysis of the meaning and intent of C.G.S. § 10-151 and the cases decided thereunder. In *Kolenberg*, however, this result is assumed not reached. (See p. 121). There is no analysis of the language of § 10-151. There is little discussion of the case law addressed by both parties about the scope of protection afforded teachers under § 10-151. The reason more studied attention is not given this issue is, of course, because of the Court's holding that there is no subject matter jurisdiction to decide this dispute. In the decision, as announced, there was no need to fully explore the scope of § 10-151. If the plaintiff is successful upon reargument in convincing the court that because of the errors above mentioned that the matter should be disposed on some grounds other than subject matter jurisdiction, then at least the core issue gets examined.

The advancement of the *Dow* doctrine in the manner announced may well be of even greater consequence. Counsel for the plaintiff has been contacted by the law firm of Kestell, Pogue & Gould, who, speaking on behalf of several of the leading and largest employee groups in the state, express concern about *Kolenberg* and join in seeking an opportunity to present to the Court reasons to alter the result in *Kolenberg*. See Exhibit D attached hereto. *Kolenberg* takes the *Dow* doctrine, that arbitration is exclusive, into areas which to

date have been contrary to established areas of federal and Connecticut law. In doing so the decision blurs important distinctions between the individual and the collective rights of workers.

The Court, in *Kolenberg*, declined to entertain the plaintiff's constitutional and 42 U.S.C. § 1983 claims, at least in part, because of *Dow* and its holding that the Court lacks subject matter jurisdiction over such claims. "[H]ad they [the constitutional and statutory claims] been raised below, the trial court would have lacked subject matter jurisdiction to entertain then because they would more appropriately have been advanced in the context of a grievance proceeding." pp. 121, 122. This result is contrary to federal and state precedent which to date has sought to preserve the distinction between collective rights, those enjoyed by a discrete group of employees and derive from the employer-employee relationship and are set out in a collective bargaining agreement, and individual rights, which, although they may apply to the work place, exist independent of the contractual relationship and derive from a statutory or constitutional source.

The United States Supreme Court has observed and adhered to this distinction:

> Not all disputes between an employee and his employer are suited for binding resolution in accordance with the procedures established by collective bargaining. While courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective-bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers. . . .
>
> 'In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective-bargaining agreement. By contrast,

> in filing a lawsuit under (the statute), an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respective appropriate forums.' *Alexander v. Gardner Denver Company,* 415 U.S. 36, 49–50 (1974).

Barrentine v. Arkansas-Best Freight System, 450 U.S. 728, 737 (1981).

> It is apparent, therefore, that in a § 1983 action, an arbitration proceeding cannot provide an adequate substitute for a judicial trial. Consequently, according preclusive effect to arbitration awards in § 1983 actions would severely undermine the protection of federal rights that the statute is designed to provide. We therefore hold that in a § 1983 action, a federal court should not afford res judicata or collateral estoppel effect to an award in an arbitration proceeding brought pursuant to the terms of a collective bargaining agreement.

McDonald v. City of West Branch, 466 U.S. 284, 290–91 (1984).

Connecticut, too, has announced a policy of permitting direct suits by employees seeking to assert or protect individual rights even though they were subject to a contract or, in the case decided, subject to an administrative dispute resolution mechanism. In *Fetterman v. Board of Trustees,* 192 Conn. 539, the court rejected the effort of the state defendants to avoid the plaintiff's claim of violation of her individual rights because of the existence of state administrative remedies. (See p. 549).

Dow supra and now *Kolenberg supra* blur the collective-individual rights distinction and in so doing close the

courthouse door to those workers, subject to collective bargaining agreements, who suffer real or perceived violations of constitutional or individual rights in the work place. The court in *Dow* said:

> In this case the individual plaintiffs and their union brought suit seeking to enjoin the board from eliminating certain administrative positions and from dismissing ten individuals. The complaint alleged that the defendants acted unfairly, violated the parties' collective bargaining agreement, violated state statutory procedures, and violated the plaintiffs' constitutional rights to due process and equal protection. Despite the multiple allegations made, the complaint is not unlike those usually brought for employee grievances and essentially seeks relief for harms occurring in the context of an employer-employee relationship. (pp. 382-393).

The plaintiff urges these policy concerns upon the Court as a reason to permit reargument, reconsideration, and further reflection. More fundamentally, the plaintiff urges the Court to reconsider its decision in *Kolenberg* because, in the plaintiff's view, the decision contains inaccuracies and misstatements.

Respectfully Submitted

This is to certify that a copy of the foregoing was mailed this 4th day of February, 1988 to all counsel of record.

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/s/ Marshall Goldberg
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SECTION 10-151 CONNECTICUT GENERAL STATUTES

(a) For the purposes of this Section:

(1) The term "Board of Education" shall mean a local or regional Board of Education or the board of trustees of an incorporated or endowed high school or academy approved pursuant to section 10-34, which are located in this state;

(2) The term "teacher" shall include each certified professional employee below the rank of superintendent employed by a board of education in a position requiring a certificate issued by the state board of education;

(3) The term "continuous employment" means that time during which the teacher is employed without any break in employment as a teacher for the same board of education;

(4) The term "full-time employment" means a teacher's employment in a position at a salary rate of fifty percent or more of the salary rate of such teacher in such position if such position were full-time;

(5) The term "part-time employment" means a teacher's employment in a position at a salary rate of less than fifty percent of the salary rate of such teacher in such position, if such position were full-time;

(6) The term "tenure" means:

(a) the completion of thirty school months of full-time continuous employment for the same board of education. For purposes of calculating continuous employment towards tenure, the following shall apply:

(i) for a teacher who has not attained tenure, two school months of part-time continuous employment by such teacher shall equal one school month of full-time continuous employment except, for a teacher employed in a part-time position at a salary rate of less than twenty-five percent of the salary rate of a teacher in such position, if such position were full-time, three school months of part-time continuous employment shall equal one school month of full-time continuous employment;

(ii) a teacher who has not attained tenure shall not count layoff time towards tenure, except that if such teacher is reemployed by the same board of education, within five calendar years of the layoff, such teacher may count the previous continuous employment immediately prior to the layoff towards tenure; and

(iii) a teacher who has not attained tenure shall not count authorized leave time towards tenure if such time exceeds ninety student school days in any one school year, provided only the student school days worked that year by such teacher shall count towards tenure and shall be computed on the basis of eighteen student school days or the greater fraction thereof equaling one school month.

(b) for a teacher who has attained tenure prior to layoff, tenure shall resume if such teacher is reemployed by the same board of education within five calendar years of the layoff.

(c) except as provided in subparagraph (b) of this subdivision, any teacher who has attained tenure with any one board of education and whose employment

with such board ends for any reason and who is reemployed by such board or is subsequently employed by any other board, shall attain tenure after completion of sixteen school months of continuous employment. The provisions of this subparagraph shall not apply if,

(i) prior to completion of the sixteenth school month following commencement of employment by such board, such teacher has been notified in writing that his or her contract will not be renewed for the following school year, or

(ii) for a period of five or more calendar years immediately prior to such subsequent employment, such teacher has not been employed by any board of education.

(7) The term "school month" means any calendar month other than July or August in which a teacher is employed as a teacher at least one-half of the student school days.

(b) Any board of education may authorize the superintendent to employ teachers. Any superintendent not authorized to employ teachers shall submit to the board of education nominations for teachers for each of the schools in the town or towns in such superintendent's jurisdiction and, from the persons so nominated, teachers may be employed. Such board shall accept or reject such nominations within thirty-five days from their submission. Any such board of education may request the superintendent to submit multiple nominations of qualified candidates, if more than one candidate is available for nomination, for any supervisory or administrative position, in which case the superintendent shall submit such a list and may place the candidates on such list in the order in which such superintendent recommends such candidates. If such board rejects such nominations, the superintendent shall submit

to such board other nominations and such board may employ teachers fronm the persons so nominated and shall accept or reject such nominations within one month from their submission. The contract of employment of a teacher shall be in writing.

(c) The contract of employment of a teacher who has not attained tenure may be terminated at any time for any of the reasons enumerated in subdivisions (1) to (6), inclusive, of subsection (d) of this section; otherwise the contract of such teacher shall be continued into the next school year unless such teacher receives written notice by April first in one school year that such contract will not be renewed for the following year. Upon the teacher's written request, such notice shall be supplemented within seven days after receipt of the request by a statement of the reason or reasons for such nonrenewal. Such teacher, upon written request filed with the board of education within twenty days after the receipt of notice of termination or nonrenewal, shall be entitled to a hearing either before the board or, if indicated in such request and if designated by the board, before an impartial hearing panel established and conducted in accordance with the provisions of subsection (d) of this section, such hearing shall commence within fifteen days after receipt of such request unless the parties mutually agree to an extension. The teacher shall have the right to appear with counsel of the teacher's choice at such hearing. A teacher who has not attained tenure and whose contract is terminated for any of the reasons enumerated in subdivisions (1) to (4), inclusive, of subsection (d) of this section shall have the right to appeal in accordance with the provisions of subsection (f) of this section. No right of appeal shall exist if (A) a teacher who has not attained tenure has received nonrenewal notice prior to April first of a school year, or (B) such teacher's contract is terminated for the reasons enumerated in subdivisions (5) and (6) of subsection (d) of this section.

(d) The contract of employment of a teacher who has attained tenure shall be continued from school year to school year, except that it may be terminated at any time for one or more of the following reasons:

(1) inefficiency or incompetence;

(2) insubordination against reasonable rules of the board of education;

(3) moral misconduct;

(4) disability, as shown by competent medical evidence;

(5) elimination of the position to which the teacher was appointed or loss of a position to another teacher, if no other position exists to which such teacher may be appointed if qualified, provided such teacher, if qualified, shall be appointed to a position held by a teacher who has not attained tenure, and provided further that determination of the individual contract or contracts of employment to be terminated shall be made in accordance with either,

(a) a provision for a layoff procedure agreed upon by the board of education and the exclusive employees' representative organization, or

(b) in the absence of such agreement, a written policy of the board of education;

(6) other due and sufficient cause.

Nothing in this section or in any other section of the general statutes or of any special act shall preclude a board of education from making an agreement with an exclusive bargaining representative which contains a recall provision. Prior to terminating a contract, a board of education shall vote to give the teacher concerned a

written notice that termination of such teacher's contract is under consideration and, upon written request filed by such teacher with such board within seven days after receipt of such notice, shall within the next succeeding seven days give such teacher a statement in writing of the reasons therefor. Within twenty days after receipt of written notice by the board of education that contract termination is under consideration, such teacher may file with such board a written request for a hearing. Such hearing shall commence within fifteen days after receipt of such request, unless the parties mutually agree to an extension, either before the board of education or, if indicated in such request or if designated by the board before an impartial hearing panel. The impartial hearing panel shall consist of three members appointed as follows: The board of education shall appoint one panel member, the teacher shall appoint one panel member, and those two panel members shall choose a third, who shall serve as chairperson. Within fifteen days after the close of the hearing before an impartial hearing panel, unless the parties mutually agree to an extension, such panel shall submit in writing its findings and a recommendation to the board of education as to the disposition of the charges against the teacher, and shall send a copy of such findings and recommendation to the teacher. The board of education shall give the teacher concerned its written decision within fifteen days of receipt of the written recommendation of the impartial hearing panel. Each party shall pay the fee of the panel member selected by it and shall share equally the fee of the third panel member and all other costs incidental to the panel's hearing. If the hearing is before the board of education, the board shall render its decision within fifteen days after the close of such hearing, and shall send a copy of its decision to the teacher. Either hearing shall be public if the teacher so requests or the board so designates. The teacher concerned shall have the right to appear with counsel at either hearing, whether public or private. A copy of a transcript of the proceedings of either hearing shall be furnished by the board of education, upon written

request by the teacher within fifteen days after the board's decision, provided the teacher shall assume the cost of any such copy. Nothing herein contained shall deprive a board of education of the power to suspend a teacher from duty immediately when serious misconduct is charged without prejudice to the rights of the teacher as otherwise provided in this section.

(e) The provisions of any special act regarding the dismissal or employment of teachers shall prevail over the provisions of this section in the event of conflict.

(f) Any teacher aggrieved by the decision of a board of education after a hearing as provided in subsection (d) of this section may appeal therefrom, within thirty days of such decision, to the superior court. Such appeal shall be made returnable to said court in the same manner as is prescribed for civil actions brought to said court. Any such appeal shall be a privileged case to be heard by the court as soon after the return day as is practicable. The board of education shall file with the court a copy of the complete transcript of the proceedings of the hearing held by the board of education or by an impartial hearing panel for such teacher, together with such other documents, or certified copies thereof, as shall constitute the record of the case. The court, upon such appeal, shall review the proceedings of such hearing and shall allow any party to such appeal to introduce evidence in addition to the contents of such transcript, if it appears to the court that additional testimony is necessary for the equitable disposition of the appeal. The court, upon such appeal and after a hearing thereon, may affirm or reverse the decision appealed from. Costs shall not be allowed against the board of education unless it appears to the court that it acted with gross negligence or in bad faith or with malice in making the decision appealed from.

Section 2

This act shall take effect July 1, 1983, provided the provisions of this act shall not apply to layoff, nonrenewal or termination proceedings initiated prior to July 1, 1983.

No. 87-1843

In The

Supreme Court Of The United States

OCTOBER TERM, 1987

JOHN F. KOLENBERG,
Petitioner,

v.

THE BOARD OF EDUCATION OF THE CITY OF STAMFORD, CONNECTICUT,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a state court may, pursuant to state public policy governing the resolution of disputes between teachers and boards of education, require a teacher to exhaust available grievance and arbitration remedies under a collective bargaining agreement with respect to claims of violation of federal statutory and constitutional rights before seeking relief in the state courts, where those claims are part of a broader dispute relating to the agreement and where the grievance procedures are an appropriate vehicle for the resolution of those claims.

2. Whether, where a federal issue has not been raised in the state court below in a procedurally correct fashion under applicable state court rules, that issue may be raised before this Court.

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BRIEF FOR RESPONDENT IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

In 1977, the Petitioner, John F. Kolenberg ("Kolenberg"), was a tenured school teacher employed by the Board of Education of the City of Stamford, Connecticut (the "Board"). In that year, Kolenberg requested a leave of absence for the academic year 1977-78 under the provisions of a collective bargaining agreement. Acting pursuant to the provisions of

the agreement, the Board granted the requested leave. The collective bargaining agreement in question required any teacher taking advantage of the provisions of such agreement to notify the Board of his or her intention to return from such leave not later than February 1 of the academic year for which the leave was taken in order to assure his entitlement to reemployment.

Kolenberg failed to notify the Board of his intention to return by the contractual deadline date. Instead, he gave notice approximately one and one-half months after the February 1 deadline. Consistent with the terms of the collective bargaining agreement, the Board treated Kolenberg's failure to give notice within the required time limit as a contractual election not to continue as a teacher, and concluded that he had ceased to be its employee. (Pet. App. 15A). The Board did not invoke Connecticut's statutory due process provisions for teacher termination because it regarded the employer-employee relation to have ended contractually pursuant to the collective bargaining agreement.

The collective bargaining agreement containing the leave and notice of return provisions established a formal procedure for pursuing grievances with respect to claims of violations, misinterpretations, or misapplications of the provisions of the agreement. This grievance process included rights to arbitration and appeal to and review by the Connecticut courts. (Pet. App. 22A).

Kolenberg commenced, but did not pursue, a grievance with respect to the Board's position under the grievance procedures established by the collective bargaining agreement. (Pet. App. 23A). Instead, in October, 1978, he brought this case in the Connecticut Superior Court, claiming, *inter alia*, to have been denied statutory notice and hearing rights available under Connecticut General Statutes § 10-151 to tenured teachers whose employment is terminated for cause or elimination of position.

In May, 1984, nearly six years after the commencement of the action, Kolenberg filed with the Connecticut Superior Court a motion for leave to amend his complaint in order to add claims of due process violations proscribed by 42 U.S.C. §§ 1983, 1985 and 1986, and the due process and equal protection clauses of the fourteenth amendment to the United States Constitution. The Board objected to this motion on several grounds, including: (1) the almost six-year delay between the closing of the pleadings and the filing of Kolenberg's motion, (2) the bar to such claims of the applicable statutes of limitations and the doctrine of laches, (3) additional discovery burdens which the claims would place on the Board, (4) unfair delay and prejudice to the Board, and (5) failure to state a claim under the cited federal statutes and constitutional provisions. Respondent's Appendix at 1A–2A. Acting pursuant to its discretionary powers, *see Conference Center Ltd. v. TRC*, 189 Conn. 212, 216, 455 A.2d 857, 860 (1983), the superior court denied Kolenberg's motion for leave to amend. (Pet. App. 16A).

Subsequently, the superior court held that Kolenberg's failure to give the required notice of his intent to return operated as a constructive resignation and therefore that the protections of § 10-151 were not available to him. (Pet. App. 11A–12A).

Kolenberg then appealed and his case was placed on the docket of the Connecticut Supreme Court. The supreme court held that Kolenberg was not entitled to access to the courts by virtue of § 10-151 because his employment was not terminated for cause within the meaning of that statute. The court therefore ruled that Kolenberg's case should be dismissed.

In its decision, the court also rejected several claims by Kolenberg relating to the operation of the collective bargaining agreement, including federal constitutional claims. Citing Connecticut statutes evidencing a preference for resolving disputes between teachers and boards of education through

contract grievance proceedings, the court held that those claims should have been pursued under the grievance procedures of the collective bargaining agreement and that Kolenberg's failure to exhaust the grievance and arbitration remedies available under the collective bargaining agreement before seeking redress in the state courts deprived the trial court of subject matter jurisdiction over the claims as a matter of Connecticut law. The court concluded that the requirement of exhaustion applied to all of these claims, including Kolenberg's contention that his tenure was a protected property right under the federal constitution violated by the non-renewal provisions of the collective bargaining agreement, because the grievance procedures were an appropriate vehicle for the resolution of these claims. The court held further that these claims were in any event not properly before the court under applicable Connecticut procedural rules because they were not raised below, and did not arise after trial. (Pet. App. 21A-23A).

SUMMARY OF THE ARGUMENT

Kolenberg states that "the Connecticut Supreme Court has denied Petitioner the right to have his federal constitutional guarantees protected in state court. It has done so under the erroneous belief that where an arbitration clause exists, the state court is foreclosed from protecting constitutionally-granted individual rights." (Pet. 12).

This characterization of the Connecticut Supreme Court's position is not accurate. The court's decision does no more than insist that a teacher pursuing issues, including federal constitutional issues, involving the operation of a collective bargaining agreement must, in the interests of the orderly administration of justice, and consistent with state policies governing the resolution of disputes between teachers and boards of education, first pursue established grievance and arbitration remedies under the collective bargaining agreement to which the teacher is subject, before resorting for relief to the Connecticut state courts. Moreover, and for similarly sound reasons of judicial policy, the Connecticut Supreme Court has insisted that federal constitutional claims like Kolenberg's must be raised within the same procedural framework as is applicable to any claim brought in the state's courts and that Kolenberg's failure to raise his federal claims in a timely and procedurally proper manner therefore precludes their consideration by the Connecticut courts. (Pet. App. 21A-23A).

ARGUMENT

I. CONNECTICUT'S REQUIREMENT THAT A TEACHER MUST EXHAUST APPLICABLE GRIEVANCE AND ARBITRATION REMEDIES PRIOR TO RAISING FEDERAL STATUTORY AND CONSTITUTIONAL CLAIMS IN THE CONNECTICUT STATE COURTS WITH RESPECT TO ISSUES ARISING WITHIN THE SCOPE OF A COLLECTIVE BARGAINING AGREEMENT IS CONSTITUTIONALLY PERMISSIBLE AND THE RULING BELOW DOES NOT IN ANY EVENT REQUIRE THAT THE OUTCOME OF THOSE REMEDIES BE GIVEN PRECLUSIVE EFFECT BY THE CONNECTICUT COURTS.

Kolenberg contends that the Connecticut Supreme Court's decision conflicts with several cases (*Atchison, Topeka & Sante Fe Railway Co. v. Buell*, ____ U.S. ____, 107 S. Ct. 1410 (1987); *McDonald v. City of West Branch*, 446 U.S. 284 (1984); *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981); and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974)), *see* Pet. 7-10, decided by this Court which hold that federal courts may not give preclusive effect to an arbitration award where federal statutory or constitutional rights are asserted with respect to matters within the scope of the collective bargaining agreement under which the arbitration has been conducted. However, the Connecticut court's position does not affect the federal courts and represents a sound and appropriate rule designed to assure the orderly resolution of disputes between teachers and boards of education in Connecticut.

In the first place, the opinion below only requires that a teacher exhaust grievance and arbitration remedies before resorting to state court review. The court explicitly contemplates the availability of court relief after exhaustion has occurred. There is no holding in the opinion that state court review of constitutional issues would necessarily be subject to preclusion resulting from determinations growing out of grievance and arbitration proceedings.

In addition, while it is true that this Court has determined that claims in the federal courts pursuant to 42 U.S.C. § 1983 are not subject to exhaustion of administrative remedies, *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496 (1982); *McNeese v. Board of Education*, 373 U.S. 668 (1963), the cases do not bar state court invocation of the exhaustion requirement in appropriate circumstances in order to reasonably regulate the access of claimants to state courts, at least where, as here, court relief is available following exhaustion. *Cf. Martinez v. California*, 444 U.S. 277, 284, n. 7 (1980).

As the Connecticut Supreme Court points out, an arbitration award pursuant to the collective bargaining agreement containing the leave and notice of intent to return provisions at issue here is subject to a right of appeal to the Connecticut courts. (Pet. App. 22A). Moreover, in *School Administrators Ass'n v. Dow*, 200 Conn. 376, 511 A.2d 1012 (1986), the leading Connecticut case requiring exhaustion of grievance and arbitration remedies with respect to the resolution of disputes between teachers and boards of education, the court expressly states that "the plaintiffs therefore should have pursued their claims under the grievance-arbitration provisions of their collective bargaining agreement *before seeking redress in state court.*" (Emphasis added). *Id.* at 383, 511 A.2d at 1016. The court thus makes it clear that court review is available once exhaustion has occurred. *Dow* also notes that under Connecticut law, legal principles, including constitutional claims, may be addressed in the grievance and arbitration process. *Id.* n. 4.

The court's decision is consequently not one giving "preclusive" effect to arbitration decisions. Rather, the court only insists that, where available, as they were here, grievance and arbitration procedures under a collective bargaining agreement must precede the assertion of a claim in state court with respect to an employment issue where the relief requested is within the scope of the contractual remedies available. *See id.* at 382-385, 511 A.2d at 1016. This rule is a reasonable one designed to assure the orderly administration of justice

and to respect Connecticut's strong preference for resolving disputes between teachers and boards of education through contract grievance proceedings where possible. (Pet. App. 22A-23A).

II. PETITIONER FAILED TO RAISE HIS FEDERAL CONSTITUTIONAL CLAIMS IN A TIMELY MANNER.

The Connecticut Supreme Court's opinion below also holds that Kolenberg's claims relating to the operation of the collective bargaining agreement were not made in timely fashion in accordance with applicable state court rules and that they are therefore in any event subject to dismissal without regard to the merits. (Pet. App. 21A). Kolenberg makes no claim that Connecticut's rules of practice with respect to the raising of claims in the Connecticut courts are in violation of federal constitutional guarantees.

Kolenberg's federal constitutional claim that the non-renewal provision of the collective bargaining agreement violated a property right to tenure was not raised until the appeal stage in this litigation. The viability of Kolenberg's assertion that the Connecticut court's exhaustion rule conflicts with this Court's decisions necessarily depends upon the viability of his federal constitutional attack on the collective bargaining agreement provisions regarding leave and notice of intention to return. His delay in making this attack until the appeal stage of his case precludes him from raising here the question of the consistency of Connecticut's exhaustion rule with this Court's decisions. *See Beck v. Washington*, 369 U.S. 541, 550-554 (1962).

As the Connecticut Supreme Court notes, claims must, under Connecticut law, be raised properly before the trial court if they are to be available for assertion at the appellate court level. (Pet. App. 21A). The federal claims raised by the attempted amendment to the complaint before the superior

court in 1984 did not assert that the collective bargaining agreement provision in question violated Kolenberg's right to tenure. Moreover, his motion for leave to amend was in any event properly denied. In addition, Kolenberg's claims before the superior court sought rights to notice and hearing pursuant to § 10-151 which the supreme court has held are not available because of his failure to satisfy the requirements of the agreement for entitlement to reemployment.

Connecticut is entitled to establish a reasonable procedure for the orderly handling of claims in its courts. It has done so. Kolenberg has failed to preserve and pursue his federal claim in accordance with Connecticut procedural requirements and therefore is in any event not entitled to relief.

CONCLUSION

For the foregoing reasons, the Board respectfully submits that the petition should be denied.

Respectfully Submitted,

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June 1988

No. 87-1843

In The

Supreme Court Of The United States

OCTOBER TERM, 1987

JOHN F. KOLENBERG,
Petitioner,

v.

THE BOARD OF EDUCATION OF THE CITY OF STAMFORD, CONNECTICUT,
Respondent.

APPENDIX TO RESPONDENT'S BRIEF

[DEFENDANT BOARD'S] OBJECTION TO PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT

The defendants in the above action hereby object to the plaintiff's motion, dated May 30, 1984, to file an amended complaint. This objection is made on the following grounds:

1. The original complaint action was filed in 1978 concerning events which took place in 1978. As filed, it alleges only violations of state law.

2. In his proposed amendment complaint, the plaintiff seeks to allege for the first time violations of four sections of the Civil Rights Act of 1871, 42 U.S.C. § 1983, 1985 and 1986 and the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

3. The actions complained of took place more than six years ago, and any claim under the above cited sections is barred by the statute of limitations and by the doctrine of laches. *Board of Regents v. Tomanio*, 446 U.S. 478 (1980); *Park v. Board of Trustees of City University of New York*, 654 F.2d 856 (2d Cir. 1981), *cert. denied*, 455 U.S. 1000; *Williams v. Walsh*, 558 F.2d 667 (2d Cir. 1977); Sec. 52-577 C.G.S. Amendment should not be allowed where the claim sought to be added would be defeated by a motion to dismiss.

4. The pleadings have been closed in this case for nearly six years.

5. On May 16, 1984, the defendants took the deposition of the plaintiff, John Kolenberg, restricting their inquiry to the claims stated in the complaint as it had existed since 1978.

6. Amendment of the complaint to add new allegations of legal violations at this date would necessitate another deposition of the plaintiff and/or other discovery to ascertain the basis of these new causes of action.

7. Allowance of the proposed amendment at this date six years after the action was commenced would unfairly delay the trial of this case and would prejudice the defendants.

8. The proposed amendment would fail to state a claim under any of the cited federal statutes or constitutional provisions.

WHEREFORE, the plaintiff's Motion for Leave to File Amendment to Complaint should be denied.

THE DEFENDANTS,
BOARD OF EDUCATION OF
THE CITY OF STAMFORD,
ROBERT J. PEEBLES AND
JOHN J. MORRIS

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